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Supreme Court, U.S.
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No. 93-1239

In The

Supreme Court Of The United States

October Term, 1993

STANLEY V. TUCKER,
Petitioner,

v.

NORTHEAST SAVINGS, F.A.,
ROBERT R. BASINE, DONNA GALLUZZO,
LORRAINE WHITEHOUSE and PACE INVESTMENT
ASSOCIATES,
Respondents.

On Petition For a Writ of Certiorari To
The Connecticut Supreme Court

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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QUESTIONS PRESENTED

1. Whether the Connecticut Appellate Court and the Connectcut Supreme Court decided this case in a way that is in conflict with a decision of this Court.

2. Whether the petitioner's claim under Connecticut v. Doehr is moot.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW iv

STATEMENT REGARDING CORPORATE OWNERSHIP v

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT 8

I. The Decision Of The Connecticut Supreme Court Is Consistent With The Decision Of This Court In Connecticut v. Doehr . . 8

II. Tucker's Claim Is Moot Because He Received Notice And A Hearing Before Each Receiver Was Appointed 12

III. Tucker's Reliance On Atlantic Trust v. Chapman Is Misplaced 15

CONCLUSION 16

TABLE OF AUTHORITIES

Atlantic Trust v. Chapman, 208 U.S. 360, 28 S. Ct. 406, 52 L. Ed. 528 (1908) 7-8, 15-16

Connecticut v. Doehr, __U.S.__, 111 S.Ct. 2105, 115 L.Ed. 2d 1 (1991) 7-14, 17

DeFunis v. Odegaard, 416 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.26 164 (1971) 13

Erie Rail Road v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) . 16

Hartford Federal Savings & Loan Ass'n v. Tucker, 20 Conn. App. 804, 565 A.2d 557, cert. denied, 213 Conn. 810, 568 A.2d 792 (1989) 15

Hartford Federal Savings & Loan Association v. Tucker, 196 Conn. 172, 177, cert. denied, 474 U.S. 920 (1985) 2, 8-9, 11-13

Tucker v. Northeast Savings, 675 F. Supp. 763 (D. Conn. 1987), app. dismissed, 849 F.2d 1468 (2d Cir. 1988), cert. denied, 488 U.S. 1007 (1989) 3,4,5

Tucker v. Pace Investment Associates, 32 Conn. App. 384, 629 A.2d 470 (1993), cert. denied, 288 Conn. 906 ___ A.2d ___ (1993) 6, 14

OPINION BELOW

Tucker v. Pace Investment Associates, 32 Conn. App. 384, 629 A.2d 470 (1993), cert. denied, 228 Conn. 906, ___ A.2d ___.

STATEMENT REGARDING CORPORATE OWNERSHIP

Of the five Respondents, only Northeast Savings, F.A. is a corporation. It is a wholly-owned subsidiary of Northeast Federal Corp., the stock of which is publicly traded. Northeast Savings, F.A. has only wholly-owned subsidiaries.

STATEMENT OF THE CASE

This case arose from four foreclosure actions against the petitioner, Stanley Tucker, brought in the Superior Court of Connecticut in 1978 which concluded in favor of Hartford Federal Savings & Loan Association, corporate predecessor of respondent Northeast Savings, F.A. ("Northeast Savings"). Respondent Robert R. Basine, an attorney, represented Northeast Savings in the foreclosure proceedings and in subsequent appeals in state courts. The properties involved were ultimately sold to respondents Donna Galluzzo and Lorraine Whitehouse, who mortgaged them to respondent Pace Investment Associates. During the pendency of the foreclosure actions and subsequent appeals, the Superior Court

appointed two receivers of rents. Tucker was present, was granted a hearing, and voiced his objections at the time of each appointment. For this reason, on appeal the Supreme Court of Connecticut held that the Superior Court's rent receiver rules, embodied in Connecticut Practice Book Sections 504 through 510, had accorded Tucker due process of law and therefore were constitutional both as applied and facially. Hartford Federal Savings & Loan Association v. Tucker, 196 Conn. 172, 177 ("Hartford Federal"). Moreover, as to that ruling, the United States Supreme Court denied certiorari. Hartford Federal Savings & Loan Association v. Tucker, 474 U.S. 920 (1985).

Having exhausted the appellate procedures of both the state and the

federal judiciaries, Tucker filed a lawsuit in the United States District Court for the District of Connecticut under 42 U.S.C. Section 1983, again on the ground that the state court's rent receiver rules unconstitutionally denied him due process of law and, therefore, were unconstitutional both as applied and on their face. That action named as defendants the defendants herein, Pace Investment Associates excepted. The defendants moved to dismiss the action. By Order dated December 15, 1987, Judge Peter C. Dorsey granted the defendants' Motions to Dismiss on the grounds that the District Court lacked subject matter jurisdiction of the appellant's claims and that those claims were res judicata. Tucker v. Northeast

Savings, 675 F. Supp. 763 (D. Conn. 1987).

Tucker appealed Judge Dorsey's ruling to the United States Court of Appeals for the Second Circuit (hereafter, "Second Circuit"). By Order dated May 2, 1988, a three-judge panel granted the respondents' Joint Motion to Dismiss and for Summary Affirmance "substantially for the reasons stated in the Memorandum and Order of Judge Peter C. Dorsey." Tucker v. Northeast Savings, 849 F.2d 1468 (2d Cir. 1988). Tucker's Petition for Rehearing and Suggestion for Rehearing en banc were denied by the Second Circuit's Order dated July 5, 1988. Tucker filed a corrected Petition for a Writ of certiorari in the United States Supreme Court on October 26, 1988, which petition was denied. Tucker v.

Northeast Savings, 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780.

Tucker then filed this action in the Connecticut Superior Court on or about April 7, 1989. The original Complaint re-alleged Tucker's claim for 42 U.S.C. Section 1983 violations as alleged in the United States District Court and added a Second Count based upon common law fraud. Tucker's civil rights count was dismissed by the Court on October 4, 1989, and after a number of versions of his Second Count had been stricken by the Court, a final version, sounding in abuse of process, was answered by the defendants, who then moved for summary judgment on the grounds of statute of limitations and res judicata. On January 4, 1992, the Superior Court granted summary judgment in favor of the defendants.

Tucker then appealed to the Connecticut Appellate Court, which upheld the decision in an Opinion released on August 10, 1993, Tucker v. Pace Investment Associates, 32 Conn. App. 384, 629 A.2d 470 (1993). From that decision, Tucker filed a Petition for Certification to the Connecticut Supreme Court, which petition was denied. Tucker v. Pace Investment Associates, 228 Conn. 906, ____ A.2d ____ (1993). Tucker then filed the present Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

I. Petitioner relies upon Connecticut v. Doehr, which held Connecticut's ex parte pre-judgment remedy statute unconstitutional as violative of due process. This case involves rent receiverships in foreclosure, not attachments to secure a judgment. In Connecticut v. Doehr, this Court distinguished between situations where the subject property bears no relationship to the controversy and where, as here, the plaintiff has a pre-existing interest in it.

II. Because Tucker received the due process safeguards mandated in Connecticut v. Doehr, notice and a hearing, his claim is moot.

III. Tucker's claim that, under Atlantic Trust v. Chapman, the respondent Northeast Savings was obliged to protest the conduct of rent receivers is incorrect. Atlantic Trust does not support that position and is a non-binding precedent in Connecticut.

ARGUMENT

I. The Decision Of The Connecticut Supreme Court Is Consistent With The Decision Of This Court In Connecticut v. Doehr.

In the first portion of his Petition, Tucker argues that the decision of the Connecticut Supreme Court in this case was in error because it asserted as res judicata an earlier decision of the Connecticut Supreme Court, Hartford Federal, which has been rendered "obsolete" by the decision of this Court in Connecticut v. Doehr, __U.S.__,

111 S.Ct. 2105, 115 L.Ed. 2d 1 (1991). That is not so. The Connecticut v. Doehr decision is entirely distinguishable.

To begin with, Connecticut v. Doehr concerned Connecticut's pre-judgment remedy statute which permitted the ex parte attachment of real property as security for a possible future judgment, regardless of whether that property was in any way related to the claim. This case concerns Connecticut's rent receivership rules used during mortgage foreclosures. Under Connecticut law, a receivership is not an attachment. A receivership gives control of the subject property to the court, to be managed by the court on behalf of all parties until the interests of the parties can be finally resolved. Hartford Federal, 196 Conn. at 178.

In Connecticut v. Doehr, this Court made a distinction between cases where the property attached bore no relationship to the controversy, and one where the controversy arose out of a pre-existing interest the plaintiff had in the property. Specifically, the Court referred to Connecticut's mechanic's lien statute, Connecticut v. Doehr, 115 L.Ed.2d at 14, n.4, and vendor's liens in Louisiana, Id. at 16, citing Mitchell v. W.T. Grant, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). In this case, Tucker voluntarily gave an interest in the properties to Northeast Savings, and it was on the basis of protecting that interest that a foreclosure was commenced and a receivership sought.

In the third and final portion of his argument, Tucker tries to tie the facts of his foreclosure to Connecticut v. Doehr by noting that in Hartford Federal the Connecticut Supreme Court cited Fermont Division v. Smith, 178 Conn. 393, 423 A.2d 80 (1979), which was overturned by Connecticut v. Doehr on the issue of the constitutionality of Connecticut's ex parte prejudgment remedy statute, see Connecticut v. Doehr, 115 L.Ed.2d at 12. This argument fails, however, because the Court in Hartford Federal cited Fermont Division v. Smith only for the maxim that "[d]ue process does not mandate a particular procedure but rather requires only that certain safeguards exist in whatever procedural form is afforded." That principle was not challenged by this Court in

Connecticut v. Doehr, wherein it was held: "'[d]ue process unlike some other legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" Connecticut v. Doehr, 115 L.Ed.2d at 13.

II. Tucker's Claim Is Moot Because He Received Notice And A Hearing Before Each Receiver Was Appointed.

Even if the receiverships at issue were to be characterized as attachments and Connecticut v. Doehr was applicable, the issue raised by Tucker is moot.

In addressing the issue of mootness, this Court has held:

> The starting point for analysis is the familiar proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in this case before them." North Carolina v. Rice, 404 U.S. 244, 246 30 L.Ed.2d 413, 92 S.Ct. 402 (1971). The

> inability of the federal judiciary to "review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." Liner v. Jafco, Inc., 375 U.S. 301, 306, n..3, 11 L.Ed.2d 347, 84 S.Ct. 391 (1964); see also Powell v. McCormack, 395 I.S. 486, 496, n.7, 23 L.Ed.2d 491, 89 S.Ct. 1944 (1969); Sibron v. New York, 392 U.S.40, 50, n.8, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968). ... the fact remains that under Art. III "[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." North Carolina v. Rice, supra, at 246, 30 L.Ed.2d 413.

DeFunis v. Odegaard, 416 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1971). Both receivers in the underlying case were appointed after notice and hearings in which Tucker took part. Hartford Federal, 196 Conn. at 177. Thus, Connecticut v. Doehr's due process

requirements in the context of a pre-judgment attachment, notice and a hearing, were met. Connecticut v. Doehr, 115 L.Ed.2d at 21. A ruling by this Court, on Tucker's present petition, that Tucker was entitled to notice and a hearing would not "affect the rights of the litigants" as notices and hearings were had. Although Tucker alleges in his petition that the Connecticut Appellate Court did not mention Connecticut v. Doehr in its ruling, the Appellate Court did, in fact, consider that case and specifically found that Tucker had the benefit of the due process safeguards it mandates. Tucker v. Pace, 32 Conn. App. at 391, n.2. (Tucker selectively deleted this footnote from his Appendix.)

In addition, to the extent that Tucker believed that the receivers were

guilty of negligence or malfeasance, he was entitled to request leave of the Connecticut Superior Court to sue the receivers, a right of which he availed himself, albeit unsuccessfully, see Hartford Federal Savings & Loan Ass'n v. Tucker, 20 Conn. App. 804, 565 A.2d 557, cert. denied, 213 Conn. 810, 568 A.2d 792 (1989).

III. Tucker's Reliance On Atlantic Trust v. Chapman Is Misplaced.

In the second portion of his argument, Tucker sets out an edited passage from the case of Atlantic Trust v. Chapman, 208 U.S. 360, 28 S. Ct. 406, 52 L. Ed. 528 (1908) to suggest that Northeast Savings had an obligation to protest the conduct of the rent receivers. Atlantic Trust v. Chapman concerned a rent receiver who expended

his own funds to cover receivership expenses, and brought an action to recover his losses when the proceeds of the foreclosure proved insufficient to repay those expenditures. The case does not in any way hold that a foreclosing mortgage holder is liable for the conduct of a court-appointed rent receiver. In addition to being wholly irrelevant, Atlantic Trust v. Chapman is a non-binding precedent in Connecticut, having been decided on general principles of federal common law before this Court's decision in Erie Rail Road v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

CONCLUSION

The instant petition represents Tucker's third attempt to have this Court

grant certiorari on the constitutionality of Connecticut's rent receivership rules arising out of these foreclosures. In this last, desperate effort, filed fully fifteen years after the foreclosures were commenced, Tucker raises no authority applicable to rent receiverships in mortgage foreclosures. Rather, he cites Connecticut v. Doehr, which is inapplicable to his argument and, indeed, holds that Tucker was entitled to exactly those due process safeguards which he received.

This latest petition offers nothing new. The issue of Tucker's due process rights was settled in 1985, and no further debate is needed. For all of the foregoing reasons, Tucker's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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